Keen Kleeners Limited v Kenya Plantation and Agricultural workers' Union (Civil Appeal 101 of 2019) [2021] KECA 352 (KLR) (17 December 2021) (Judgment)

Neutral citation: [2021] KECA 352 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 101 OF 2019

SG KAIRU, P NYAMWEYA & A MBOGHOLI-MSAGHA, JJA

DECEMBER 17, 2021

BETWEEN

KEEN KLEENERS LIMITED ..... APPELLANT

AND

KENYA PLANTATION AND AGRICULTURAL WORKERS' UNION ..... RESPONDENT

(An appeal from the judgment of the Industrial Court at Mombasa (Rika, J.) delivered on 14th November 2014 in Mombasa Industrial Court Cause No. 163 of 2013)

JUDGMENT

1. Through an amended statement of claim, 43 persons (hereinafter "the grievants") represented by the respondent union herein, initially filed suit against the appellant herein in the Industrial Court. The grievants prayed that the Court finds the appellant guilty of violating Section 40 of the *Employment Act* 2007 and all other enabling provisions of the law; and for orders that the appellant reinstate the grievants to their positions without loss of benefits to date or, if reinstatement was untenable, order the appellant to pay for days worked, 1 month's pay in lieu of notice; annual leave and overtime if any; severance pay at 15 days' pay for each complete year of service; and 12 months' wages as compensation for wrongful loss of employment.

2. The respondent's case was as follows. In May, June and July 2011, the appellant recruited 129 unionisable employees, among them being the 43 grievants. On 5th July 2011, the respondent forwarded a proposed Recognition Agreement to the appellant together with the duly executed check off forms with respect to its employees. On 9th July 2011, the appellant summoned all unionisable employees at Lafarge – Diani, to its headquarters in Tudor – Mombasa where the appellant's management inquired whether the employees had wilfully joined the respondent union which the employees confirmed. The employees were then informed that the working days had been reduced from 6 to 3 days in a week. Efforts by the respondent to find out why the work week system had been

changed did not elicit any reply. On 1st August 2011, the uni0nisable employees were locked out of the work premises and instructed to go to the head office for further instructions.

3. At the head office, the grievants were singled out from the rest and told there was no work for them and that they would be summoned in due course for handing over company property and collection of final dues. According to the respondent, the grievants were the most active in organizing their colleagues into joining the union. The respondent averred that no payment had been made to the affected employees as payment in lieu of notice, annual leave if any, and gratuity or severance in line with Section 40 of the *Employment Act* 2011. Further, that the appellant had a practice of not according annual paid leave and workers rest day to its employees contrary to Sections 28 and 27 (2) of the *Employment Act*; and that the appellant had been acting in breach of Sections 30 and 34 of the *Employment Act* 2007 in matters of provision of sick leave.

4. The response of the appellant was as follows. The appellant had a contract with Bamburi Cement Ltd for cleaning, eco-system and garden maintenance, manpower supply for a bio-fuel project in Diani, garbage collection and other services. Further, that the grievants had entered into a contract with the appellant which contracts terminated by virtue of expiration of time within which the contracts were to run. According to the appellant, the grievants had not been terminated or declared redundant but their contract had legally expired. In addition, that the amount of work and number of workers required at Lafarge Eco Systems Diani was determined solely and wholly by Bamburi Cement, and Bamburi Cement normally gave the appellant work based on Local Purchase Orders and Work Schedule under which these determinations were made. The appellant averred that it had always made it known to its employees as at the time of executing contracts that the contract was subject to availability of work. It was also contended that the appellant remitted all dues as required by law.

5. The appellant further averred that in July 2011, it received a list from the respondent seeking remittance of the union fee to COTU and the union, as well as a letter forwarding the recognition agreement. That the recognition agreement referred to "Panda Flowers Keen Kleeners Limited" which was a stranger to the appellant, and the agreement envisaged its commencement in June 2011 yet the same was delivered in July 2011. Given the ambiguity, the appellant stated that it could not sign the agreement without ensuring the rights of its employees were protected.

6. Regarding the claim of reduction of the working days from 6 to 3 days, the appellant reiterated the discretion of Bamburi Cement to determine the amount of work and staffing requirement, and averred that a representative of Bamburi Cement personally informed the workers of the said changes and clearly explained the reasons for the reduction. The appellant contended that an order forcing it to retain employees whose contracts have expired would legally breach the appellant's rights as envisioned by the Constitution.

7. The matter proceeded to trial and the respondent called 3 witnesses. Dzogolo Swaleh testified that the appellant hired him on 24th March 2007 as a gardener. He was given a written contract and was paid per month. He was continuously employed by the appellant until he was stopped on 1st August 2011. He reported to work in the morning and found the gates locked. The supervisor informed him that business had reduced. He was not issued with a termination letter and the salary for July 2011 was paid. Dzogolo confirmed that he was a member of the respondent union and that the appellant's supervisor informed him that the company wanted him to leave the union or face dismissal. That he refused to leave the union and was terminated without written notice or reasons given. That he did not get leave during the three years of service.

8. On cross-examination, Dzogolo stated that the contract he signed was from 1st March 2011 to 31st July 2011, and prior to the contract, he was on other short term contracts. He stated that he expected his

contract to be renewed as was the practice. He did not go on leave and was not paid in lieu of accrued leave. Clause 5 of the contract stated that employment was subject to availability of work. Further, that all of the grievants who were dismissed had joined the union.

9. Mwanaidi Juma Mwabasa and Hamisi Bakari Lidago gave a similar account to that of Dzogolo in their testimonies. They were first employed by the appellant in 2007 on contracts that were renewed at the end of the contract period. They expected their latest contract to be renewed. They did not take annual leave during their employment. Mwanaidi testified that he joined the union and was in the lead in fighting for the union but the appellant's supervisor wanted him to leave the union. When the reported to work on 1st August 2011, the gate was closed and the supervisor to them to go and "kaa chonjo". They were not given notice before being terminated.

10. The appellant's sole witness was Richard Kipng'etich Koech, its General Manager. Koech testified that the appellant was contracted by Bamburi Cement to provide manpower for the Diani biofuel project. The appellant would hand over its employees to Bamburi Cement to train and allocate duties. Bamburi Cement would determine the number of staff required. The rate agreed was Kshs. 430/= per person for 8 hours, and the appellant was to pay the employees 62.5% of the Kshs. 430/=. The grievants signed employment contracts and undertakings. The contracts were for 5 months and was subject to the availability of work. The appellant had no obligation to renew the contract. The terms and conditions were contained in the contract. The appellant remitted statutory and union deductions to the relevant bodies.

11. Koech testified that the appellant kept attendance records and the records showed that Mwanaidi worked for 21 days in July 2007 and was off for 3 days; Dzongolo worked for 21 days in May 2007, was off duty for 2 days and absent for 1 day; and Bakari worked for 21 days and was off duty for 3 days. Koech stated that at the end of the contracts, the appellant would pay the grievants final dues including uniform refund and leave dues. Regarding the recognition agreement, Koech stated that the appellant was not presented with a corrected agreement.

12. Koech testified that the Diani project was unique in that the hiring of workers was limited to the site of the project and they hired through the area administration. The jobs were seasonal and Bamburi Cement would tell the appellant the numbers required through emails, phone calls or physically at the site. The numbers would go up during the rainy season. Bamburi Cement would make purchase orders for labour and determine the number of casual workers and provide the schedule for them. Koech stated that the grievants contracts were not terminated for joining a union, and that about 90% of its workers at Diani were members of the union.

13. On cross-examination, Koech testified that the contract provided that termination was by way of one-month notice or payment in lieu of notice, and conceded that the appellant did not give the one-month notice. He also conceded that some staff were not paid leave outstanding. He stated that the grievants were not paid because they did not clear by surrendering uniforms but were not told the numbers required had gone down.

14. In the award, the trial Court found that the appellant's only reason for not acceding to the respondent's demand for recognition was that the wrong name was given in describing the appellant. The learned judge held that the prayer for recognition was allowed and the appellant shall sign a corrected recognition agreement forwarded by the respondent within 30 days.

15. On the issue of unlawful termination, the trial Court held that the appellant's characterization of the grievants as casual workers was incorrect as the grievants cumulatively served for continuous working days of not less than 1 month and were paid monthly. The trial Court concluded that Section 37

demanded that the grievants be treated as regular employees with full benefits and protections afforded under the Act.

16. Therefore, that upon termination of the last contract on 31st July 2011, the appellant had an obligation to issue the grievants notice under Section 35 (1) (c) or pay 1 month salary in lieu of notice under Section 36 of the *Employment Act* 2007. The Act also extended the benefit of paid annual leave of not less than 21 working days; consideration for service pay or severance pay in case of redundancy; overtime pay; salary for days worked; and compensation, reinstatement or re-engagement in case of finding the termination to have been unfair.

17. The trial Court examined the contract between the appellant and Bamburi Cement and observed that the two companies seem to have treated labour like a commodity, complete with Local Purchase Orders. The trial Court accordingly held that such a triangular relationship, where human beings are purchased through LPOs, is to be discouraged. That there was no good reason why Bamburi Cement could not engage these employees directly yet Bamburi Cement was in control of the workplace, directed and trained the workers and determined their minimum wage. That the only reason it would recruit through the appellant was to avoid the regulatory burdens imposed on employers under the *Employment Act*.

18. While the trial Court found that the appellant was not under obligation to renew the contracts of the grievants, the parties had a relationship since 2007 and the appellant had been routinely renewing the contracts without fail. It was for the respondent to prove reason for termination under Section 43 of the *Employment Act*. The trial Court noted the evidence of Koech to the effect that after July 2011, the appellant recruited another 50 employees and in September 2011 2,080 man hours were required as opposed to 1,300 man hours in July 2011. The trial Court further questioned the logic of terminating the contracts with the grievants who had already been trained and had been working since 2007.

19. The trial Court thus concluded that the nature of the relationship between the appellant and the grievants, where the short term contracts since 2007 had been renewed automatically for year on end, meant that there was a legitimate expectation of renewal of the contracts. The contracts stated that renewal was subject to availability of work yet there was nothing on record to show diminished work as at 31st July 2011. To that extent, the appellant failed in showing a valid and fair reason for not taking the grievants' contracts beyond 31st July 2011. The termination combined with the refusal to consider renewal would be deemed unfair termination under Section 43 as read with Section 45 of the *Employment Act* 2007.

20. The trial Court ordered that the grievants shall be paid 4 months' salary in compensation for unfair termination; and that the claim for 1 month salary in lieu of notice was well founded in the law and fact and thereby granted; the appellants shall pay to the grievants 5 days' salary acknowledged as outstanding in July 2011, as well as annual leave pay as tabulated in the Schedule attached to the appellant's submissions.

    There being no clear case of redundancy or proper evidence given on overtime pay, the prayers for severance pay and overtime pay were declined.

21. Dissatisfied with the judgment, the appellant filed the present appeal seeking to set aside the judgment and decree of the Industrial Court. The appeal is premised on the grounds that the trial Court erred in fact and in law as follows: Failing to properly consider the pleadings and evidence adduced before court; arriving at a decision that is contrary to the weight of and inconsistent with the evidence adduced by both the appellant and respondent; and failing to properly consider the written submissions made by the appellant.

22. Having found that the grievants were employed by the appellant on short term contracts and were paid by the appellants on monthly basis, the trial Court also erred in finding that the grievants were employed by the appellant as casual employees; in consequently considering the period(s) for which the grievants had served the appellant as such

> " casual employees"; and in finding the grievants were regular employees of the appellant and therefore entitled to full benefits and protections afforded under the *Employment Act* 2007; introducing issues for determination that did not arise from the pleadings of the parties before the court; examining and castigating the relationship between the appellant and Bamburi Cement Company which was not a party to the suit before him; and finding that the appellant had treated labour like a commodity; concluding, in the absence of Bamburi Cement Company as a party before him, that the only reason why the grievants were recruited through the appellant was for Bamburi Cement Company to avoid the regulatory burdens imposed by the *Employment Act* 2007;

23. Further, that having found that the grievants' term contracts expired on 31st July 2011, the trial Court erred in holding against the weight of evidence before him, that the grievants employment was terminated by the appellant; in imposing a burden on the appellant to prove the reason for termination before examining whether the grievants and/or the respondent had proved that their employment had been unfairly terminated; in finding that the grievants had a legitimate expectation of renewal of their term contracts upon expiry; in finding that the appellant had an obligation to give a valid and fair reason for declining to renew the grievants' term contracts upon expiry on 31st July 2011; and concluding that the "termination of the contracts" combined with the "refusal to consider renewal" would be deemed unfair termination of the grievants' employment by the appellant.

24. The first issue addressed by the counsel for the appellant was whether the trial Court failed to consider the pleadings of the parties. Counsel submitted that the respondent, in its amended memorandum of claim, alleged that the appellant was in contravention of Section 40 of the *Employment Act* 2007 that deals with termination on account of redundancy. That in the respondent's submissions, the respondent shifts the direction of the case from redundancy to unlawful and wrongful lockout and claims damages for the same without amending its memorandum of claim. In addition, that at no point in its evidence adduced at trial or in submissions did the respondent establish a case for unfair termination nor did it submit authorities in support of the same. Counsel faulted the trial Court for making findings on these issues when the same were never pleaded and proved.

25. On the trial Court's finding that Section 37 of the *Employment Act* 2007 demands that the grievants are treated as regular employees enjoying the full benefits and protections afforded under the Act, counsel submitted that the *Employment Act* defined employment relationships as existing in the forms of a casual basis, fixed term contract, personal or open-ended term contract, and probationary contracts. Further, that the evidence adduced indicated that the grievants' contractual relationship with the appellant was that of a fixed term contract and they were already enjoying the protection of the *Employment Act*. The trial Court's categorization of the relationship as "regular" employment was therefore an error of law and fact and created a vague employment relationship that would expose the appellant to unknown risk and open the Pandora's box on untenable labour relations.

26. Counsel took particular issue with the Court's finding that the appellant and Bamburi Cement seemed to have treated labour like a commodity complete with local purchase orders, that such triangular relationships ought to be discouraged, and that the only reason Bamburi Cement would recruit through the appellant was to avoid the regulatory burdens placed on employers. Counsel in this respect submitted that the trial Court was clouded and prejudiced against the appellant, as these issues were

never before the court for determination. Counsel relied on *Kenya Airways Limited v Aviation and Allied Workers Union and 3 others [2014] eKLR* where this Court held that outsourced services is one such widely accepted business concept, which enables a company to focus on core business, reduce overheads, increase cost and efficiency savings, and manage cyclical resource demands, and was not designed to deprive Kenyans of their jobs.

27. On the issue of whether the grievants were unfairly terminated from employment, counsel submitted that all the fixed term contracts of the grievants came to an end 31st July 2011. That even after finding that fixed term contracts carry no expectation of renewal, the trial Court placed upon the appellant a higher standard than that of the law and past decisions because the parties had a relationship running from 2007, and the contracts had routinely been renewed from that time. Counsel faulted this finding because the court did not address the fact that only a few of the grievants were in this position, and because renewal was at the sole discretion of the appellant.

28. Counsel contended that the grievants were not terminated but their contracts of employment lapsed by reason of effluxion of time and thus there was no contract to terminate. Counsel cited the case of *Amatsi Water Services Company v Francis Shire Chachi [2018] eKLR* for theproposition that a fixed term contract will terminate ,on the sunset date unless extended in terms stated in the contract; that a court cannot rewrite the terms of a contract freely entered into between the parties; and that there is no obligation on the part of an employer to give reasons to an employee why a fixed term contract of employment should not be renewed. Counsel also took issue with the finding by the trial Court that the grievants had a legitimate expectation of renewal, and relied on a number of cases holding that fixed term contracts carry no expectancy of automatic renewal, including *George Onyango v The Board of Directors of Numerical Machining Limited and others [2014] eKLR*.

29. The thrust of the respondents submissions was as follows. On the ground that the learned judge failed to consider the pleadings of the parties, Counsel for the respondent submitted that the amended memorandum of claim indicated that the grievants had been unfairly terminated on account of a lock out by the appellant, after they joined the respondent union. Further, that the evidence led by the respondent at the trial also supported the orders issued by the trial Court.

30. Regarding the employment status of the grievants, counsel contended that there was no error on the part of the trial Court to refer to the contractual employees as regular. Counsel questioned why the grievants were not given notice of their intended termination by the appellant without subjecting them to a lock-out if the grievants were enjoying the protection of the law. In addition since the grievants had been serving on 3 month renewable contracts since April 2007, which contracts had been renewed more than 10 times, their lawful expectation was that the same would be renewed on 1st August 2011 unless there was one month notice of non-renewal and reasons given for the same. Counsel relied on the case of *Oshwal Academy (Nrb) & another v Indu Vishwanath Civil Appeal No. 125 of 2011* in which this Court held that the employer was under a duty to take the respondent through the mandatory process under Section 40 before termination; and that the employee was entitle to notice despite the contract having come to an end.

31. Counsel also submitted that the appellant's locking out the grievants without giving them any notice that their employment was not going to be renewed was unfair and punitive; and the appellant did not comply with Section 36 of the *Employment Act*. Counsel cited *Murang'a County Public Service Board v Grace N. Makori & 178 others Civil Appeal No. 37 of 2015* for the proposition that where an employer fails to give an employee a non-renewal notice, the employer is bound to pay the employee the pay in lieu.

32. The mandate of this court in a first appeal is set out in the case of *Selle and Another v Associated Motor Boat Company Limited and others [1968] 1 EA 123*:

> " Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

33. The appellant has decried the trial Court's characterisation of the grievants as regular workers. However, the trial Court's findings were in response to the evidence led by the appellant that seemed to characterise the grievants as casual employees. Annexed emails and letters from officials of Bamburi Cement and its subsidiary Lafarge Eco Systems consistently referred to the labour force provided by the appellant as casuals. The General Manager of the appellant in his testimony also referred to the employees as casual workers yet their employment status was clearly of a different nature. The trial Court rightly noted that the grievants served for continuous working days of not less than one month and were paid monthly, a description that is not close to that of a casual employee who is defined under the *Employment Act* as "a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time."

34. The evidence was clear that the grievants were working on fixed term contracts of not less than 3 months. The trial Court's reference to the grievants as regular workers was thus more accurate than the appellant's own categorisation of the grievants as casuals. This seems to be more a matter of semantics that the actual substance of the trial Court's findings, and a reading of the judgment as a whole indicated that the trial Court was alive to the fact the grievants were employed on fixed term contracts.

35. It was also the contention of the appellant that the trial Court made findings on the issue of unfair termination yet the pleadings of the respondent dealt with termination on account of redundancy and at no point was the issue canvassed at trial or in submissions. It is trite law that parties are bound by their pleadings and the issues for determination in a suit generally flow from the pleadings or as framed by the parties for the court's determination. See *Galaxy Paints Co. Ltd v Falcon Guards Ltd [2000] EA 885* and *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR*. The court may however make a determination on an unpleaded issue where the parties have canvassed the issue and left it to the court. In *Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR* this Court held:

> " Of course if an issue arises in the course of hearing, and the same is fully canvassed by the parties, then even if that issue was not pleaded, then the court will make a determination on the matter. As was held in *Odd Jobs v Mubia [1970] EA 476*, "a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision."

36. While the amended memorandum of claim filed by the respondent brought out the principle issue as being the lock-out/redundancy of the grievants allegedly for joining the union and culminating in wrongful loss of employment, the manner in which the grievants' employment was terminated, coupled with the issue that the grievants expected renewal of their contracts, were issues that were canvassed in the course of the trial. The trial Court cannot be faulted for making a determination on the matter. On the other hand, the contractual relationship between the appellant and Bamburi Cement

was not a direct subject of the suit at the Industrial Court. The matter of whether that relationship amounted to unfair trade practices was not an issue for determination at any stage of the proceedings. The trial Court ought not to have weighed in and made determinations on the issue.

37. From the evidence on record, the last contracts governing the employment of the grievants were fixed-term contracts of varying durations but with an end date of 31st July 2011. The clause relating to termination of the contracts provided as follows:

> " Each party shall be entitled to terminate the services by giving one month's written notice and/or payment in lieu of notice."

38. The general position on the consequences of expiry of a fixed term contract, as can be gleaned from various decisions of this Court and that of the Employment and Labour Relations Court, is that once a fixed term contract is at an end, the employer has no obligation to justify termination on other grounds beyond the lapse of the fixed period (See *Trocaire v Catherine Wambui Karuno [2018] eKLR*). In Oshwal Academy (Nairobi) & another vs. Indu Vishwanath [2015] eKLR thisCourt quoted with approval the following holding of Rika J. in Bernard

> Wanjohi Muriuki vs. Kirinyaga Water And Sanitation Company Limited & another [2012] eKLR:
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> "In the view of the Court, there is no obligation on the part of an employer to give reasons to an employee why a fixed-term contract of employment should not be renewed. To require an employer to give reasons why the contract should not be renewed, is the same thing as demanding from an employer to give reasons why, a potential employee should not be employed. The only reason that should be given is that the term has come to an end, and no more. ... Reasons, beyond effluxion of time, are not necessary in termination of fixed-term contracts, unless there is a clause in the contract, calling for additional justification for the termination."

39. In *Registered Trustees of the Presbyterian Church of East Africa & another v Ruth Gathoni Ngotho-Kariuki [2017] eKLR*, where a fixedterm contract contained a clause providing for notice of non-renewal 3 months to the end of the contract, this Court rejected the contention that failure to give the notice amounted to an automatic renewal as the conduct of the employer such as removal of the employee from the payroll once the contract expired was a clear indication of the employer's position.

40. There may, however, be instances where the unique circumstances of the employment relationship may create a legitimate expectation that a fixed term contract would be renewed. In the Oshwal Academy Case (supra), for instance, this Court upheld the trial court's determination that despite the fixed term contract lapsing by effluxion of time, the respondent had a legitimate expectation of continuity from the conduct of the parties in the course of the employment relationship; and that the respondent was in employment for over 23 years and had developed a bond as to expect to work until retirement.

41. Regarding the considerations to be made when considering whether a legitimate expectation for renewal of a fixed term contract was created, the sentiments of Rika J. in *Teresa Carlo Omondi v Transparency International- Kenya [2017] eKLR* are particularly persuasive:

> " The burden of proof, in legitimate expectation claims, is always on the Employee. It must be shown that the Employer, through regular practice, or through an express promise, leads the Employee to legitimately expect there would be renewal. The expectation becomes legally

protected, and ought not to be ignored by the Employer, when managerial prerogative on the subject is exercised. Legitimate expectation is not the same thing as anticipation, desire or hope. It is a principle based on a right, grounded on the larger principles of reasonableness and fair dealing between Employers and Employees. The Employee must demonstrate some rational and objective reason, for her expectation. The representation underlying the expectation must be clear and unambiguous. The expectation must be induced by the decision maker. The decision maker must have the authority to renew. Repeated renewals, extended service beyond the period provided for in the fixed term contract, and promise of renewal, are some of the elements that would amount to objective reasons underlying expectation of renewal. The presence of these elements however, is not to be taken as conclusive proof of legitimate expectation."

42. For the sake of comparative jurisprudence, a number of South African cases explore the element of "reasonable expectation" as provided in Section 186 (b) of South Africa's *Labour Relations Act* that provides one definition of dismissal as being where an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms, but the employer offered to renew it on less favourable terms, or did not renew it at all.

43. Some of the factors that are taken into account to determine the presence or absence of this reasonable expectation were, in *Dierks v University of South Africa (J399/98) [1998] ZALC 126* para 133, held toinclude:

> "...all the surrounding circumstances, the significance or otherwise of the contractual stipulation, agreements, undertakings by the employer, or practice or custom in regard to renewal or re-employment, the availability of the post, the purpose of or reason for concluding the fixed term contract, inconsistent conduct, failure to give reasonable notice, and nature of the employer's business."

44. In *Mediterranean Woollen Mills (Pty) Ltd. v South African Clothing and Textile Workers' Union (143/96) [1998] ZASCA 11*, the SupremeCourt of Appeal of South Africa held that despite a clause of a fixed term contract stipulating that no reasonable expectation for renewal of the contract could arise from the contract, a reasonable expectation could arise where assurances made by the employer and other conduct by the employer led the employees that they could entertain such an expectation.

45. In *South African Clothing and Textile Worker's Union and Another v CADEMA Industries (Pty) Ltd (C 277/05) [2008] ZALC 5*, a worker wassimilarly employed on several fixed term contacts on a continuous and unbroken period of 4 ½ years. The court held that the several renewals or extensions over this period without any discussions as to why they were renewed, in addition to the fact that the last renewal was done after a plea from the worker and the worker was permitted to continue working for another 7 days after expiry of the contract created a reasonable expectation that the contract would be renewed.

46. In the present case, the trial Court was convinced that the grievants genuinely and legitimately expected renewal on the basis that the parties had a relationship running from 2007 whereby the grievants contracts had been renewed without fail. Despite the appellant's assertion that only a few of the grievants were in this position, no evidence was led to properly demonstrate this. The schedule of unpaid leave dues produced by the appellant indicates that by 2008 at least half of the grievants had been engaged; and a majority of the grievants were already engaged at Lafarge Diani as far back as May 2009.

47. The trial Court had a sound basis for reaching his conclusion that a legitimate expectation for renewal was created. The long standing, uninterrupted and consistent practice of renewing or extending the grievants' contracts would have surely led the grievants to believe that their last contracts would be renewed, more so in the absence of any reasonable notice to the contrary given to them by the appellant.

48. What follows is the issue of whether the grievants were unfairly terminated contrary to the provisions of Section 43 as read with Section 45 of the *Employment Act*. Having established the existence of a legitimate expectation of renewal on the part of the grievants, the appellant had to prove the reasons for terminating the employment relationship. The principle reason put forward by the appellant was the contract was subject to availability of work; and that the number of workers required at Lafarge Diani was solely determined by Bamburi Cement. However, the evidence on record relating to the operational requirements of Bamburi Cement at Lafarge Diani, as rightly pointed out by the trial Court, indicated that more, not less employees would be required in the months following July 2011.

49. The trial Court rightly questioned why the appellant would refuse to consider renewal when the evidence indicated that additional workers would be required. There is therefore no reason to interfere with the finding of the trial Court that this was a case of unfair termination.

50. Upon consideration of the entire record of the trial Court, we have arrived at the conclusion that this appeal is lacking in merit and is therefore dismissed with costs.

49. Orders accordingly.

DELIVERED AND DATED AT MOMBASA THIS 17TH DAY OF DECEMBER 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original. Signed

DEPUTY REGISTRAR